

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
RUSSELL COTTY, et al.,

Plaintiff(s),

ORDER

-against-

CV 01-5138 (LDW) (ETB)

DUPONT, INC., et al.,

Defendant(s).

-----X

The plaintiffs request, by two-page letter application, a further extension to conduct discovery in this action which commenced in August 2001. Plaintiffs claim law office failure as the basis for the request. The trial in this action is scheduled to commence on August 1, 2005. The defendants are proceeding with motions for summary judgment.

The docket sheet reflects that plaintiffs' counsel failed to appear at conferences before the undersigned on the following dates:

1. March 5, 2002
2. June 3, 2005

The request related to the March 5, 2002 conference was received an hour and a half before the conference, which had been scheduled on November 30, 2001 - more than four (4) months earlier.

This action was administratively closed by stipulation and order, dated September 30, 2002, without prejudice to reopening, to afford the opportunity for an administrative review of the plaintiffs' claims under the defendant Bristol-Myers Squibb Pharma Company Retirement Income Plan. This action was reopened by order of Judge Wexler, dated July 22, 2004. Additional discovery was

afforded the parties. See scheduling order, dated September 15, 2004. Discovery was extended to February 15, 2005. On February 8, 2005 the plaintiffs requested a further extension of discovery. By order, dated February 9, 2005, discovery was extended to May 15, 2005. A pre-trial order was directed to be filed by May 31, 2005. The final conference was scheduled for June 3, 2005 at 11:00 a.m.

Defendants filed a pre-trial order, as directed, on May 31, 2005. Plaintiffs did not. Defendants' counsel appeared in court on June 3, 2005. Plaintiffs' counsel failed to appear or otherwise communicate with the court as to his non-appearance.

At the June 3, 2005 conference discovery was certified as complete. Despite requests by defendants' counsel, plaintiffs' attorney failed to return phone calls and failed to participate in the preparation of the joint pre-trial order. Sua sponte, the undersigned extended the plaintiffs' time to file a list of trial witnesses and exhibits to June 8, 2005. Plaintiffs' counsel again failed to comply with the order of the court.

Instead, plaintiffs' counsel requested additional time to conduct a deposition and a further thirty-day extension of the joint pre-trial order - computed from the completion of discovery.

(Correspondence of James Michael Lenihan, Esq., dated June 8, 2005 at 2). The basis for the law office failure arises from an office relocation, resulting in a loss of computer access, including case management and telecommunications. Notwithstanding this problem, plaintiffs' counsel acknowledges telephone contact by counsel with respect to the closing of discovery and preparation of the joint pre-trial order. Without any adequate explanation, counsel instead ignored all the deadlines and requirements to ready this case for trial. No effort is made to explain why the deposition sought in this

action was not taken previously.

The initial scheduling order, dated August 20, 2001, provides, inter alia, that any request for an extension of discovery “must be filed prior to the discovery completion date.” Id. at 4, p.2. Discovery was complete on May 15, 2005. The present application is untimely.

In short, the facts set forth in the application, dated June 8, 2005, are inadequate to justify the relief requested.

There being no “good cause” provided for modification of the scheduling order, as required by Rule 16(b), the application by plaintiffs for additional time to conduct discovery in this action, commenced in August 2001, is denied.

SO ORDERED:

Dated: Central Islip, New York
June 21, 2005

/s/ E. Thomas Boyle
E. THOMAS BOYLE
United States Magistrate Judge